Supreme Court, U.S.
FILED
931709 APR 28 1994
No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NEW ORLEANS 2000 PARTNERSHIP,
Petitioner,

v.

BOARD OF COMMISSIONERS
OF THE NEW ORLEANS EXHIBITION HALL AUTHORITY,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

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April 28, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the valuation of an expropriated parcel of land which is less than one-half of the parcel's fair market value at the time of trial is inconsistent with this Court's decision in *Kirby Forest Industries, Inc.* v. *United States,* 467 U.S. 1 (1984), interpreting the Just Compensation Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

All of the parties are listed in the caption.

STATEMENT PURSUANT TO RULE 29.1

Petitioner New Orleans 2000 Partnership has no parent or subsidiary corporations.

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PETITION FOR A WRIT OF CERTIORARI

New Orleans 2000 Partnership petitions for a writ of certiorari to review the judgment of the Court of Appeal, Fourth Circuit, of Louisiana.

OPINIONS BELOW

The opinion of the Court of Appeal, Fourth Circuit, of Louisiana (App. at 1a-35a) is reported at 625 So. 2d 1070. The order of the Supreme Court of Louisiana (App. at 36a-37a) denying the writ of certiorari is reported at 630 So. 2d 802. The order of the Civil District Court for the Parish of Orleans, Division J (App. at 38a) entering judgment is not reported.

JURISDICTION

The judgment of the Court of Appeal of Louisiana was entered on September 22, 1993. A petition for rehearing for the limited purpose of clarifying the Court of Appeal's prior remand order was granted on November 18, 1993. The petition for a writ of certiorari was denied by the Supreme Court of Louisiana on January 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case raises the fundamental question under the Just Compensation Clause of whether a $13 million compensation award for an expropriated parcel of land with an *undisputed* fair market value at the time of trial estimated between $28.4 million and $32.4 million violates the Fifth and Fourteenth Amendments of the Constitution.[1] This dispute arose in September 1991 from the efforts of the Board of Commissioners of the New Orleans Exhibition Hall Authority ("NOEHA") to expropriate 22.85 acres of a 72-acre tract adjacent to the New Orleans Convention Center. In June 1991, petitioner New Orleans 2000 Partnership ("N.O. 2000") had entered into a binding written contract to purchase the

[1] The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 160 (1980); *Chicago B. & Q. R.R.* v. *Chicago*, 166 U.S. 226, 239 (1897).

72-acre tract from Missouri Pacific Railroad Company ("MOPAC"),[2] and thus N.O. 2000 was the owner of the 22.85-acre parcel at the time of the expropriation. Although the trial court's compensation award was less than one-half of the undisputed fair market value of the tract at the time of trial, the award was affirmed by the Court of Appeal of Louisiana. The Supreme Court of Louisiana denied N.O. 2000's petition for review.

1. In April 1989, MOPAC decided to sell a 72-acre tract that was located adjacent to New Orleans' central business district and upriver from the New Orleans Convention Center. At the time, the tract was the largest undeveloped space in the downtown area. NOEHA, a political subdivision of the State of Louisiana authorized to operate the convention center, expressed interest in purchasing MOPAC's 72-acre tract in order to expand the convention center area, but NOEHA lacked the necessary funds.[3] At NOEHA's request, the City of New Orleans signed an agreement with MOPAC to purchase the tract for $12 million in December 1989. However, the city backed out of the deal shortly thereafter, citing the $5 million estimated cost of cleaning up potential environmental contamination of the site.

Throughout 1990 and the early part of 1991, NOEHA continued its efforts to purchase the tract. NOEHA and MOPAC were unable to reach agreement, primarily because MOPAC wanted to sell the entire 72-acre tract while NOEHA wanted to purchase only 22.85 acres along

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[2] Although Missouri Pacific was acquired by and merged into Union Pacific Corporation, the combined entity will be referred to as "MOPAC."

[3] NOEHA intended to use the expropriated land to expand the convention center and provide for truck marshalling areas. On July 24, 1992, the New Orleans City Planning Commission adopted a master plan for the riverfront area, which discouraged truck mashalling in the area. Rec. at PE-182. On April 15, 1993, the City Council adopted a revised plan that *prohibited* truck marshalling in the area.

the Mississippi River. Because of its location along the river, this 22.85-acre parcel was unquestionably the most valuable part of the 72 acres and could command a premium price.

Due to its deficit operations and its lack of direct access to state funds, NOEHA could not afford to purchase all of MOPAC's land, even at a discounted price. NOEHA's efforts were further hampered by the December 1990 defeat of a city bond issue to raise financing for the purchase of the site for the convention center expansion and government office development. Nevertheless, NOEHA offered $8 million for the entire property in January 1991, although it was completely unclear whether NOEHA could raise more than $6 million for any land purchase. Rec. at Vol 35, p. 9. After rejecting NOEHA's offer, MOPAC began serious negotiations with petitioner N.O. 2000, which planned to take advantage of the site's superb location and develop the property for a non-industrial, mixed-use complex. In February 1991, MOPAC agreed to sell all 72 acres to petitioner for $11 million and so advised NOEHA. The purchase agreement was signed on June 11, 1991, with the formal closing set for September 11, 1991.

Despite the agreement that had been reached between MOPAC and N.O. 2000, NOEHA continued to offer ridiculously low sums for the property. On two occasions in May and June 1991, NOEHA offered $4 million for *half* of the 72 acres. On September 6, 1991, while MOPAC and N.O. 2000 were in the process of closing, NOEHA offered to purchase the 22.85-acre parcel for $5.5 million. Meanwhile, NOEHA rushed to prepare and file its expropriation suit before the closing between MOPAC and N.O. 2000. On September 10, 1991, one day before the scheduled closing, NOEHA filed suit to expropriate the 22.85 acres, despite the fact that its purchase offer was to remain open until September 12. The next day, pursuant to the terms of the June 11, 1991

agreement, N.O. 2000 closed on the 72 acres for $11 million.

2. On July 8, 1992, the Civil District Court for the Parish of Orleans concluded that NOEHA had demonstrated public necessity for the expropriation and that the valuation of the 22.85 acres would be determined at a jury trial in December 1992.

Between the time of the June 1991 purchase agreement and the December 1992 valuation trial, two significant events occurred that greatly increased the attractiveness of the already valuable 22.85-acre parcel: the Louisiana legislature legalized riverboat gambling in July 1991 and casino gambling in June 1992.[4] The location of the expropriated parcel along the Mississippi River made the land well-suited for docking riverboats. The proximity of the parcel to the planned Rivergate casino—less than one mile away—made the parcel an ideal location for a new hotel and parking lots to accommodate the expected tourists. Restaurants and retail stores also were likely to locate in the area.

Not only had legalized gambling increased the desirability of the parcel, but the environmental contamination concerns that had caused NOEHA to back out of the December 1989 purchase agreement were resolved. On June 1, 1992, the Louisiana Department of Environmental Quality placed the property in the "No Further Action" category, thus making environmental cleanup unnecessary. Bowes Appraisal at 31. The cost of the expected cleanup had been estimated at $5 million. Rec. at Ex. D-20; Vol. 18, pp. 52-53.

Prior to the valuation trial, NOEHA sought a ruling from the trial court that September 11, 1991, the filing

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[4] The new Louisiana gambling laws provided that each parish would be allowed up to six riverboats and that the only casino would be located at the former Rivergate Convention Hall site in New Orleans near the Mississippi River. *See* La. Rev. Stat. Ann. tit. 4, § 525.

date of the expropriation suit, was the proper date for the parties to value the 22.85-acre parcel. N.O. 2000 moved instead to have the date of valuation set as the date of trial. Relying on *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), the trial court granted the motion of N.O. 2000 and held that the trial date was the valuation date.

3. Despite the court's ruling over a month before the trial as to the proper valuation date, NOEHA acted at is own peril and presented at trial the testimony of three appraisers regarding the parcel's valuation as of the *filing date* of September 10, 1991—more than a year prior to the trial date and without regard to the legalization of gambling on the Mississippi River. All of NOEHA's appraisers agreed that based on the situation existing at that time the highest and best use of the property was heavy industrial use with possible future development. App. at 18a. The appraised value of the 22.85-acre parcel was estimated under the comparable sales method for that type of property as: $5,534,530 (Jimmie Thorns, Jr.); $5,525,000 (Robert Merrick); and $5,250,000 (Charles Seymour). *Id.*[5]

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[5] Although the legalization of casino gambling post-dated the September 10, 1991, "as of" date of NOEHA's appraisals, riverboat gambling was legalized prior to this date. However, NOEHA's appraisals relied on heavy industrial "comparables" and virtually ignored the economic impact of riverboat gambling on the parcel's value, taking the counterintuitive position that legalized gambling would either not affect property values or would affect them only slightly. *See* Thorns Appraisal at 2 ("it is the feeling of this appraiser, at the time of the appraisal, [that] the riverboat gaming authorization did not promote increases in land value"); Merrick Appraisal at 3 ("[t]he impact of either land based or riverboat gaming on the subject site is difficult to measure"); Seymour Appraisal at 16 ("we believe that the coming of gambling does have some modest positive effect on the value of the subject property. But the increment to present worth must clearly be discounted substantially and applied with caution").

Petitioner, on the other hand, presented the testimony of John Beckman, an expert in urban planning, who concluded that the highest and best use of the property in light of the new gambling opportunities was a non-industrial, mixed-use development comprising hotels, office buildings, and high-rise residential units. *Id.* at 19a. Although the property was zoned for industrial use at the time of trial, Beckman explained that every study and plan by the City of New Orleans of the riverfront area contemplated multi-use development of the area, thus suggesting that such use was likely to be approved in the near future. Rec. at Vol. 34, pp. 64-79.

Petitioner then presented the testimony of two appraisers as to the value of the parcel under the comparable sales method *on the date of trial*: $28,400,000 (Peter Bowes) and $32,360,730 (Jean Felts). App. at 19a. Both appraisers opined that market perceptions about riverboat and casino gambling *on that date* had caused the fair market value of the parcel to increase significantly.

Specifically, the Felts appraisal concluded that the parcel would be a desirable location for a 1,000 room hotel, a separate riverfront condominium/rental development, and terminals to service the riverboats. Felts Appraisal at 42. In the predevelopment period, the parcel would be well-suited for parking facilities to accommodate the existing tourists who visited the city's French Quarter and the new tourists who would patronize the nearby casino and riverboats. *Id.* at 41-42.[6]

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[6] The Bowes appraisal reached similar conclusions about the possible uses of the 22.85 acres. Bowes also described the "jump start" that gambling had provided to the depressed real estate market in New Orleans and the skyrocket in land prices that had resulted from land speculation. Bowes Appraisal at 41.

NOEHA presented no evidence as to the valuation of the parcel as of the trial date. Instead, on rebuttal and over petitioner's objection, it chose to rely on the single statement of one of its appraisers, Mr. Thorns, that the value of the parcel had not changed significantly between September 1991 and December 1992. App. at 18a, 20a. Earlier in the trial, Mr. Thorns and NOEHA's other appraisers had testified that their studies had not gone beyond September 10, 1991. Notwithstanding the fact that *only* petitioner's appraisers provided competent testimony about the parcel's valuation as of the trial date, petitioner was awarded a mere $13 million, less than half of the undisputed appraised value of the expropriated property as of the trial date.

Petitioner appealed, and contended that NOEHA's rebuttal statement lacked a factual basis and should have been excluded. Petitioner also contended that the trial court erred in denying petitioner's motions for a directed verdict and judgment notwithstanding the verdict, both of which would have set the value of the expropriated property at $28,400,000.[7]

4. The Court of Appeal, Fourth Circuit, affirmed. First, it held that under Louisiana case law, the value of expropriated property is as of the filing date of the expropriation suit. *Id.* at 14a-18a & n.5.[8] The court concluded, however, that *Kirby* prohibits a court from considering the filing date as the valuation date when there has been a subsequent increase in the property's value. *Id.* at 15a-16a. Having correctly recognized the applica-

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[7] The Court of Appeal's opinion incorrectly noted that N.O. 2000's JNOV motion sought to have the parcel valued at $28,300,000. *See* App. at 21a.

[8] Citing *State* v. *Landry*, 53 So. 2d 908, 910 (La. 1951); *Louisiana Ry. & Navigation Co.* v. *Baton Rouge Brickyard*, 67 So. 922, 924 (La. 1915); *City of New Orleans* v. *Giraud*, 346 So. 2d 1113, 1118 (La. Ct. App. 1977).

bility of *Kirby*, the court then proceeded to examine the justness of the compensation under both the United States and Louisiana Constitutions.[9] The court affirmed the compensation award, finding that Mr. Thorns' rebuttal testimony was properly admitted and that the testimony was enough to create a question of fact as to the value of the expropriated property. *Id.* at 21a-22a. Alternatively, the court speculated that the $13 million award was reasonable even without the rebuttal testimony:

> [T]he jury could have reasonably arrived at a value lower than N.O. 2000's lowest estimate by comparing the methods of valuation and the comparables used by NOEHA's experts in its case in chief with those used by N.O. 2000's experts, *even though each set of experts used a different date of valuation.*

Id. at 22a (emphasis added).

One judge, Judge Waltzer, filed a concurring opinion noting that she would not have relied on *Kirby*, because the longstanding rule in Louisiana is that the filing date of the suit is the valuation date. *Id.* at 24a. However, regardless of the valuation date, she would have found the $13 million award to be supported by the record. *Id.*

The Court of Appeal granted NOEHA's rehearing application for the limited purpose of clarifying the remand order. The case was remanded to the district court solely to determine attorney's fees, costs, and interest. The Supreme Court of Louisiana denied N.O. 2000's petition for review.

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[9] The Louisiana Constitution is similar to the Fifth Amendment in its requirement that property may not be taken without just compensation. *See* La. Const. art. I, § 4. The Louisiana Constitution differs slightly in its requirement that "[i]n every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss." *Id.* This provision was intended to broaden recovery to include, *inter alia*, attorney's fees, court costs, and business profits. *See Louisiana* v. *Constant*, 369 So. 2d 699, 701 (La. 1979).

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeal of Louisiana raises the fundamental issue of how to value expropriated property under the Just Compensation Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. The court's approval of a valuation that was less than one-half of the undisputed fair market value measured on the correct date—the trial date—deprives the holding in *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), of all meaning. Not only is the decision below plainly wrong as a matter of law, but it also reflects a growing confusion among lower courts over the method by which expropriated property should be valued. Review by this Court is therefore necessary to clarify the standards for determining fair market value.

1. In *Kirby*, this Court reaffirmed the principle that fair market value is measured by what a "willing buyer" would pay to a "willing seller" at the time of the taking. 467 U.S. at 10 (quoting *United States* v. *Miller*, 317 U.S. 369, 374 (1943)); see also *Olson* v. *United States*, 292 U.S. 246, 255 (1934) (condemnee "entitled to be put in as good a position pecuniarily as if his property had not been taken"). *Kirby* recognized the "convention" adopted by courts that the commencement of the trial is the date of valuation. 467 U.S. at 17. In *Kirby*, however, the actual taking did not occur until three years *after* the trial date, and the value of the land had increased in the interim period. A unanimous Court held:

> However reasonable it may be to designate the date of trial as the date of valuation, if the result of that approach is to provide the owner *substantially less* than the fair market value of his property on the date [of the taking], it violates the Fifth Amendment.

Id. (emphasis added). The case was remanded for a modification of the compensation award in light of the material change in land value.

Kirby thus stands for the dual propositions that the fair market value of expropriated property must be measured as of the trial date and that the failure to account for an increase in market value violates the Fifth Amendment. In *Kirby*, the lower courts had failed to account for the appreciation that had occured after the trial and before the taking. The instant case involves the similar, but even more compelling, situation of appreciation that occurred after the filing of the expropriation suit and before the trial.

2. This Court should review the instant case because the compensation award was "substantially less" than the undisputed fair market value of the expropriated parcel at the time of the valuation trial. What makes the valuation issue so stark here is that there was a fundamental difference between the parties as to the proper set of assumptions concerning the highest and best use of the property. Because NOEHA relied upon an impermissible valuation date, its experts concluded that the property would have a particular use without regard to gambling. Petitioner's experts testified, based on the correct valuation date, that beyond question gambling on the river would increase the market value of the property.

Quite obviously, the $13 million award was based on a blend of NOEHA's outdated appraisals and those offered by petitioner. But NOEHA's appraisals should never have been presented to the jury, because they embodied a manifestly incorrect assessment of the market based on the wrong valuation date. This blending by the fact-finder of invalid and valid appraisals ensured that the compensation was below the market value and therefore squarely conflicted with the ultimate holding in *Kirby*.[10]

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[10] The logic of this argument is supported by the settled rule that when a fact-finder is faced with two conflicting expert appraisals, it must decide which is more credible. *See Feigenbaum* v. *City of Waterbury*, 565 A.2d 5, 7 (Conn. App. Ct. 1989); *cf. Bundy* v. *Dugger*, 675 F. Supp. 622, 634 (M.D. Fla. 1987) (conflict-

Accordingly, the Court of Appeal disregarded both the undisputed facts before it [11] and this Court's decisions interpreting the Just Compensation Clause.

The Court's legal analysis in this area is grounded in the proposition that just compensation should be based on the fair market value at the time of the taking. *Kirby*, 467 U.S. at 10. All non-speculative factors that affect fair market value *must* be considered in determining compensation. See *Olson* v. *United States*, 292 U.S. 246, 255, 257 (1934). In the instant case, it could hardly be said that the appreciation of the parcel's value, which resulted from the legalization of gambling, was unduly speculative. The expropriated parcel's location, both along the Mississippi River and near the planned Rivergate casino, made it a natural focal point for riverboat and casino operators and tourist businesses catering to the expected gambling patrons. Consequently, the determination of the parcel's value should have reflected "the adaptability for use in a particular business," namely, gambling. *Mitchell* v. *United States*, 267 U.S. 341, 344 (1925).[12]

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ing expert psychiatric opinions), *aff'd*, 850 F.2d 1402 (11th Cir. 1988). It cannot simply "blend" or "average" the valuations in the conflicting appraisals, particularly when the appraisals disagree about the "highest and best use" of the property.

[11] Counsel for petitioner has been unable to find any post-*Kirby* just compensation case, either federal or state, in which a court disregarded an appraisal with a valuation date as of the trial date and instead relied on an appraisal conducted more than a year before the trial date.

[12] Almost 50 years before *Mitchell*, the Court declared that the adaptability of land for a particular purpose was a proper element in determining the value of expropriated land. *Boom Co.* v. *Patterson*, 98 U.S. 403 (1878). There, the location of the land on three islands in the Mississippi River made them a natural "log boom." The Court found that "[t]he position of the three islands . . . added largely to the value of the lands. . . . Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." *Id.* at 408. The logic of *Patterson* requires a retrial in this case.

At the time of the valuation trial in December 1992, legalized gambling in New Orleans was not merely a fanciful dream; both riverboat and land-based gambling already had been approved, and interested gambling operators were in the process of submitting bids and obtaining the necessary regulatory approvals. Petitioner's appraisers were thus unquestionably correct in considering the impact of gambling on the parcel's potential use in their valuations of the property. See *Olson*, 292 U.S. at 255 (fair market value considers "[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed *in the reasonably near future*") (emphasis added).

NOEHA also did not contend, nor did the Louisiana courts conclude, that the market value was " 'too difficult to find.' " *Kirby*, 467 U.S. at 10 n.14 (quoting *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)); see also *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 513 (1979) (noting that public facilities such as roads and sewers are difficult to value because they are infrequently sold). The Louisiana courts had at their disposal petitioner's thoroughly researched appraisals analyzing the effect of both land-based and riverboat gambling on the value of the expropriated parcel. In fact, both of petitioner's appraisals specifically examined the effect that riverboat gambling had had on the waterfront land prices in Biloxi, Mississippi, another area that recently had legalized riverboat gambling. The Biloxi data demonstrated a dramatic increase in land prices after gambling was legalized there. Even if there remained some uncertainty about the parcel's potential use, this Court has noted that economic evaluations, such as appraisals, often depend on assumptions, and therefore some amount of speculation is permissible in establishing market value. See *United States* v. *Miller*, 317 U.S. 369, 374-75 (1943); *cf. Kirby*, 467 U.S. at 17 ("prediction of the value of land at a future time is notoriously difficult").

Finally, this is not a case in which a monetary award could not provide full compensation to a landowner because of the land's "special value" or other subjective quality. See *id.* at 10 n.15; *564.54 Acres of Land*, 441 U.S. at 511-12. Rather, this is a case in which the compensation award failed to take into account *objective* market data that the land was in greater demand due to the legislature's approval of riverboat and casino gambling.[13] Indeed, this Court has stated that landowners should be compensated for land appreciation that results from governmental actions of this type:

> [T]he development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project *or for some other public purpose*, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of *all available economic uses* of the property at the time of the taking.

United States v. *Reynolds*, 397 U.S. 14, 16-17 (1970) (emphases added).

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[13] Recent newspaper articles have indicated that petitioner has received offers to purchase the remaining 49 acres for $35 million, or $16.40 per square foot, *see* Jeffrey Meitrodt, *Canizaro Negotiating Land Sale*, The Times-Picayune, April 12, 1994, at A1, a much higher figure than the $13.00 per square foot that the Louisiana courts awarded for the *more desirable* 22.85-acre parcel. These recent offers are much closer to petitioner's expert appraisals which were based on the potential interest of riverboat operators, who now in fact have made offers to purchase the less desirable portion of the property. In fact, a final agreement has been reached, and the actual sales price is $37.5 million, slightly higher than the published reports. This new development should be considered in determining whether the compensation award complied with the commands of the Fifth Amendment. *See United States* v. *68.94 Acres of Land*, 918 F.2d 389, 398 (3d Cir. 1990) (noting that the majority of circuit courts have allowed the introduction of post-taking comparable sales).

In sum, the Court of Appeal approved a methodology for determining just compensation that was calculated to undervalue the expropriated property, in direct violation of the constitutional requirement in *Kirby*. As a general matter, where the parties offer appraisals based on wildly disparate assumptions, the court must be certain that both sets of assumptions are legally valid. If one is not, then it is fundamentally unfair to allow that appraisal to be presented to the jury. Because the Court of Appeal approved an award that was clearly influenced by an appraisal that was invalid under *Kirby*, the decision below warrants review by this Court.

3. At a minimum, *Kirby* dictates that the starting point for determining just compensation is the property's value at the time of trial. That value, according to *Kirby*, will change if the expropriated land appreciates (or depreciates) before the actual taking occurs. Here, the Louisiana Court of Appeal correctly recognized that the parcel's value should have been based on its market value as of the valuation trial in December 1992. Consequently, the court should have disregarded those appraisals with "as of" dates prior to the trial date, that is, the three appraisals submitted by NOEHA. It did not. Instead, the Court of Appeal, like the jury, chose to "split the baby" in clear derogation of the holding in *Kirby*.

Here, the Court of Appeal apparently used the *filing date* of the expropriation (September 10, 1991) as its starting point and measured any appreciation from that date. See *supra* at p. 9. Assuming *arguendo* that NOEHA's appraisals were valid—and their failure to consider gambling's impact on the parcel's value demonstrates that they were not [14]—the appraisals were con-

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[14] *See Seravalli* v. *United States*, 845 F.2d 1571, 1575 (Fed. Cir. 1988) ("any appraisal method 'must take into account all market conditions affecting price, for example, the availability of financing, the marketing techniques used, and the relevant real estate market' ") (citation omitted).

ducted more than a year before the date of trial and should never have been admitted by the trial court, submitted to the jury, or allowed to play a role in the Court of Appeal's decision. The Court of Appeal thus erred when it sought to justify the reasonableness of the $13 million award by comparing it to NOEHA's appraisal estimates as of the wrong date ($5.2 million to $5.5 million) and petitioner's proper appraisal estimates ($28.4 million to $32.3 million).[15] See App. at 22a. Because the $13 million award fell almost halfway between the high and low figures of the parties' appraisals, the court reasoned that the award was appropriate.

This justification for "splitting the baby" is fundamentally flawed. A comparison of this type would have been proper only if all of the appraisals were as of the trial date. See *United States* v. *L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993). Here, NOEHA's appraisals clearly were not credible. Had the Court of Appeal instead compared the $13 million award to only the undisputed market values in petitioner's appraisals, it would have concluded that the award could not satisfy the standard of just compensation. Because the court relied on appraisals that were not proper, the compensation awarded to N.O. 2000 was constitutionally inadequate.

4. In its interpretations of the Fifth Amendment, this Court has stated that the "basic measurement of compensation has been hedged with certain refinements in the interest of effectuating the constitutional guarantee." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970). *Kirby* was an important "refinement" because of its recognition of changing market values. As illustrated by the

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[15] Even if the Louisiana court's valuation theory were plausible, the $13 million award still might fail to satisfy the just compensation requirement. *See Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 17 (1984) (despite the government's "plausible explanation for [a] valuation procedure," the Fifth Amendment was not satisfied).

instant case, however, *Kirby's* potency is diminished when lower courts improperly value the potential use of expropriated property. See *Washington Metro. Area Transit Auth.* v. *One Parcel of Land,* 780 F.2d 467, 471 (4th Cir. 1986) ("courts are often ill-equipped to umpire between competing experts with their typical parade of appraiser's argot and jargon in evaluation cases"). Consequently, this case presents the Court with a unique opportunity to define more precisely the standards for determining the fair market value of expropriated property, particularly when there has been a material increase or decrease in value. *Cf. San Diego Gas & Elec. Co.* v. *City of San Diego,* 450 U.S. 621, 659 (1981) (Brennan, J., dissenting) (expressing the need to develop additional rules of valuation for temporary regulatory takings).

Despite the Court's enunciation of broad principles regarding what constitutes fair market value, see *supra* at pp. 12-14, it has been careful "not to reduce the concept of 'just compensation' to a formula." *United States* v. *Cors,* 337 U.S. 325, 332 (1949); see also *United States* v. *Virginia Elec. & Power Co.,* 365 U.S. 624, 633 (1961) (concept of fair market value is "not an absolute standard nor an exclusive method of valuation"); *United States* v. *Commodities Trading Corp.,* 339 U.S. 121, 123 (1950) ("[t]his Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases"). Instead, the calculation of just compensation should be governed by "basic equitable principles of fairness." *United States* v. *Fuller,* 409 U.S. 488, 490 (1973).

Kirby alluded to the need for a "more easily administrable way of ensuring that the compensation paid to the owner of condemned land does not fall substantially below the fair market value of the property on the date of the taking," *Kirby Forest Indus., Inc.* v. *United States,* 467 U.S. 1, 19 n.30 (1984). However, *Kirby* provided limited guidance to lower courts on the critical issue of the type of evidence that should be considered

in the determination of changing market value and how such evidence should be evaluated.[16] In fact, the Court noted that "[n]one of the discussion in this opinion is intended to modify either the manner in which the fair-market-value standard is interpreted and applied or the test for determining when the fair-market-value standard must be supplanted by other formulae." *Id.*

Left to fashion their own theories of just compensation, lower courts have reached widely varying conclusions as to the appropriate compensation required by the Fifth Amendment. Several courts have chosen to adopt approaches that are manifestly supportive of the "highest and best use" method for evaluating what constitutes just compensation,[17] while others have adopted approaches far less likely to ensure just compensation.[18] How fair market value should be determined under the Just Compensation Clause also has been a vexing issue for state courts.[19]

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[16] Nevertheless, the Court expressed confidence that on remand the district court could "easily adduce evidence" regarding the change in market value. *Kirby*, 467 U.S. at 18. Arguably, the facts in *Kirby* did not lend themselves to a full explication of the proper method of determining changed market value. There, the expropriated land was a parcel of timberland that apparently had no potential use other than as timberland.

[17] *See, e.g., United States* v. *69.1 Acres of Land*, 942 F.2d 290 (4th Cir. 1991) (sand mining site); *Yancey* v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990) (turkey breeder stock); *United States* v. *104 Acres*, 666 F. Supp. 1017 (W.D. Mich. 1987) (farmland used to grow corn); *United States* v. *100.80 Acres of Land*, 657 F. Supp. 269 (M.D.N.C. 1987) (sand mining site).

[18] *See, e.g., United States* v. *L.E. Cooke Co.*, 991 F.2d 336 (6th Cir. 1993); *United States* v. *62.50 Acres of Land*, 953 F.2d 886 (5th Cir. 1992) (clam shell mining site); *United States* v. *27.93 Acres of Land*, 924 F.2d 506 (3d Cir. 1991) (enterprise district); *United States* v. *7.92 Acres of Land*, 769 F.2d 4 (1st Cir. 1985) (seashore property); *Yaist* v. *United States*, 17 Cl. Ct. 246 (Cl. Ct. 1989) (partially submerged island).

[19] *See, e.g., Religious of the Sacred Heart* v. *City of Houston*, 836 S.W.2d 606 (Tex. 1992) (religious school); *Department of*

The confusion surrounding just compensation and fair market value is magnified when uncertainties surround the potential use of the expropriated property.

Several post-*Kirby* decisions illustrate the different approaches taken by courts. On one hand, a number of courts have favorably reviewed requests by landowners to ensure that they will receive the true market value of what has been taken from them. For instance, in *United States* v. *69.1 Acres of Land*, 942 F.2d 290 (4th Cir. 1991), the Fourth Circuit affirmed a compensation award of $456,900, the amount requested by the landowner, despite the government's contention that the property was worth between $54,000 and $63,000. *Id.* at 292. The higher value was justified by the land's potential use as a commercial sand mining facility. The Fourth Circuit recognized that "[t]he size of this award for a currently undeveloped tract may raise eyebrows," *id.* at 293, but noted that

> the landowner does not have to show an *imminent demand* for the sand from his property. He just has to show that there is a reasonable probability that the sand will be needed and wanted at a near enough point in the future to affect the current value of the property.

Id. at 294 (emphasis added) (footnote omitted); see also *id.* at 294 n.3 (noting that "how far in the future the sand will actually be mined" is unimportant). In arriving at the higher valuation figure, the court discounted the fact that the needs of sand buyers already were being met by existing sand mines. *Id.* at 294.

Similarly, the Federal Circuit held in *Yancey* v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990), that fair market value must account for "the property's *capacity to produce future income* if a reasonable buyer would consider

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Transp. v. *Lundberg*, 825 P.2d 641 (Ore.) (in banc) (sidewalk dedication ordinance), *cert. denied*, 113 S. Ct. 467 (1992); *Opinion of the Justices*, 555 A.2d 1095 (N.H. 1989) (public utilities).

that capacity in negotiating a fair price for the property." *Id.* at 1542 (emphasis added). Thus, the owners of turkeys that had been slaughtered as the result of a government quarantine could be compensated for the value of the turkeys as egg producers—which was the intended use of the turkeys—rather than the lower value of the turkeys themselves. *Id.*

In contrast to these cases, for example, the Fifth Circuit took a more narrow approach in affirming an award of $54,000 for a potential clam shell mining site, despite the landowner's claim that the property was worth between $266,000 and $889,075. *United States* v. *62.50 Acres of Land*, 953 F.2d 886, 888 (5th Cir. 1992). Noting that "regulatory contingencies associated with a potential use, like other sources of uncertainty, must be considered in determining just compensation due for expropriated property," *id.* at 890, the court rejected the shell mining proposal as too speculative because of the many federal and state permits required for mining. *Id.* at 891. Although the district court made no finding as to whether the permits would be necessary and unobtainable, the Fifth Circuit found it unlikely that the potential use as a shell mine would cause interested buyers to pay a significantly higher price for the property. *Id.* at 893.

A similarly restrictive approach was taken by the Sixth Circuit in *United States* v. *L.E. Cooke Co.*, 991 F.2d 336 (6th Cir. 1993). The court affirmed a $65,000 award for a parcel that, according to the landowner's expert, had an estimated value of $427,000 because of the land's potential use as a coal mine. Despite agreement among both parties' experts that coal existed in substantial quantities, the Sixth Circuit accepted the government's contention that mining was not economically feasible at that site. *Id.* at 340. The court reasoned that the highest and best use of the land is not reasonably probable if a substantial investment of capital is necessary. *Id.* at 341. Additionally, the fact that the landowner had never taken

any steps to establish a mining operation on the land was seen as significant. *Id.* at 343.

To be sure, the determination of just compensation depends on the facts of a particular case, particularly when uncertainties surround the potential use of the property. Nevertheless, it is clear that lower courts diverge on the extent to which they will accept prospective uses of property as legitimate bases for compensation. Clearly, the Court of Appeal's decision is the most extreme in refusing to accept the impact of gambling on the market even though there was no contrary evidence. Federal and state courts, therefore, require greater guidance as to the proper standards to apply when evaluating conflicting appraisals that are based on conflicting dates of valuation. This case, by examining one element in the highest and best use determination, presents a vital opportunity to detail those standards. In so doing, the Court can reinvigorate its holding in *Kirby* by refusing to allow inconsistency in lower court decisions to undermine the bedrock principle that just compensation must reflect the fair market value of the property evaluated at the correct time and based on proper market assumptions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 28, 1994

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